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CITATIONS

741061—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1134

CENTRAL STATES ELECTRIC COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The court below filed no opinion. Its findings of fact and order with respect to the distribution of the money in which petitioner asserts an interest are set forth in the record (R. 36–58). Its order denying petitioner's subsequent motion to re-open the case and for leave to intervene sets forth the reason therefor (R. 72).

JURISDICTION

The order of the court below directing distribution of the money in which petitioner claims

an interest was entered on August 17, 1946 (R. 58). The order denying petitioner's motion to re-open and for leave to intervene was entered December 17, 1946 (R. 72). The petition for certiorari was filed on March 17, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the course of a proceeding for the distribution of an impounded fund which had been accumulated pursuant to a stay pending review of a rate reduction order of the Federal Power Commission, the court below after hearing entered an order approving a plan of distribution of such fund, which order was to be final as to petitioner, among other enumerated companies, unless objections were filed within 15 days from the date thereof. Petitioner was notified by regular mail of the proposed plan and of the hearing and was served by registered mail with a copy of the order entered therein. Petitioner did not participate in the hearing, did not file objections to the order within the time allowed, and did not seek a rehearing within twenty days after the order became final as permitted by rule of court. Sixty-seven days after entry of the order, petitioner filed a motion to reopen the cause and for leave to intervene. The motion was denied four months after entry of the order, and the petition to this Court

for a writ of certiorari was filed on the last day of the period allowed for seeking review of the order denying the motion—long after expiration of the time for seeking review of the first order.

The question presented is whether petitioner, having delayed asserting his claim to the funds until after the order distributing those funds became final, may now secure a review of the court's refusal to entertain a collateral attack on its order.

STATEMENT

On March 18, 1942, the Federal Power Commission entered an order requiring Colorado Interstate Gas Company, an interstate pipeline company, to reduce its rates and charges for gas (3 F. P. C. 32; R. 9–10). The Company sought review of the order and, on May 16, 1942, secured a stay thereof conditioned on the impounding of all amounts collected in excess of the charges permitted by the order (R. 36–37). The Commission's order was sustained by the Circuit Court of Appeals for the Tenth Circuit and by this Court (*Colorado Interstate Gas Co.* v. *Federal Power Commission,* 142 F. 2d 943, 324 U. S. 581).

While the stay was in effect, $8,514,143.08 was deposited subject to further order of the court (R. 39). Of this amount, $2,334,319.02 represented excess charges collected from Natural Gas Pipeline Company, a natural gas company subject to the jurisdiction of the Federal Power Commission, engaged in supplying gas to local utility

companies (R. 39). Of this amount, $8,612.58 represents the sum allocable to quantities of gas sold to petitioner during the impounding period (R. 11–12, 50).

On April 27, 1946, a plan for distribution of that part of the impounded fund which had been collected from Natural Gas Pipeline Company was submitted to the court by the Illinois Commerce Commission (R. 17), and at the same time the plan was served on all parties, including petitioner (R. 31–33). While the plan suggested the appropriate basis for allocating all funds to the quantities of gas purchased through the local utility companies, the detailed provisions relating to ultimate payment to individual consumers related only to those companies, not including petitioner, which were subject to the jurisdiction of the Illinois Commerce Commission (R. 17–31). On July 27, 1946, the clerk of the court mailed to the interested parties, including petitioner, a copy of a letter addressed to Mr. Warren Henry, Chief Engineer, Illinois Commerce Commission, which recited that a hearing was to be held on the plan at Denver, Colorado, on August 16, 1946, and that a copy of such letter was being forwarded to all the parties in interest (R. 34–36).

The hearing was held as scheduled and, on August 17, 1946, the court entered findings of fact and an order in which, after listing the persons, including petitioner, to whom notice had been given (R. 37–38), it found that Central States

"had due and timely notice (1) of the Plan for Distribution of impounded funds to ultimate consumers submitted by the Illinois Commerce Commission, and (2) of the hearing before this Court upon such Plan on August 16, 1946," and had not "filed any objection to such proposed plan of distribution to ultimate consumers," and that "no one appeared" on its behalf at such hearing "to object to such Plan of Distribution" (R. 45–46). The court adopted the proposed plan for distribution of all the moneys involved, including the amount allocable to quantities of gas purchased by petitioner, to ultimate consumers rather than the local utility companies (R. 50–54). It further provided that its order was to be final unless appropriate objections by any party in interest were filed within 15 days from the date of the order (R. 58).

On August 19, 1946, the clerk of court forwarded a copy of the findings and order by registered mail to petitioner as directed by the order of the court. Although petitioner received the copy on August 22, 1946 (R. 59–60A), it took no action until October 23, 1946, when it filed a "Motion to Reopen this Cause and for Leave to File Petition of Intervention" (R. 61). On December 12, 1946, the Federal Power Commission filed objections thereto (R. 67). On December 17, 1946, the matter came on for hearing, and on the same day the court, after reciting petitioner's

failure to avail itself of the opportunity to be heard which had been afforded it, entered an order denying the motion (R. 72).

ARGUMENT

Insofar as the petition seeks to bring before this Court questions relating to the order of the court below, entered August 17, 1946, providing for the distribution of the impounded funds, it is unseasonably filed and should be denied. The petition was filed March 17, 1947, seven months after the entry of the order. Unless it is found that subsequent proceedings in the court below tolled the running of the three months in which a petition for a writ of certiorari might be filed, as provided by Section 8 of the Act of February 13, 1925, ch. 229, 43 Stat. 940, 28 U. S. C. 350, the statute bars review of the order.

If the steps taken to notify and make service upon petitioner were sufficient to make petitioner a party to the proceedings resulting in the order of August 17, 1946, and we think that they were, the subsequent proceedings in the court below did not stay the running of the time in which to apply for the writ of certiorari. A copy of the proposed plan on which the hearing was held was mailed to petitioner by the Illinois Commerce Commission on April 24, 1946 (R. 31–33). On July 27, 1946, a copy of a letter notifying the Illinois Commerce Commission that a hearing on the plan would be held in Denver, Colorado, on

August 16, 1946, was mailed to petitioner as an interested party (R. 34). If, as petitioner contends, this was insufficient to put petitioner on notice that its rights were to be affected by the adjudication, the defect was cured by sending to petitioner by registered mail a copy of the order which specifically disposed of the fund claimed by petitioner and provided that it would become final at the expiration of fifteen days unless objections were filed within that time (R. 72, 58). Petitioner suggests that since it did not receive the order until August 22, 1946, the ten days remaining was insufficient time within which to act (Pet. 20). However, petitioner made no effort to seek a rehearing within twenty days after the order became final as was permitted by the rules of the court.[1] Not until sixty-seven days after entry of the order and fifty-two days after time to file objections thereto had expired did petitioner file its motion to reopen and for leave to intervene (R. 72). It is well settled that the time within which to petition for a writ of certiorari may only be tolled by the filing of a timely petition for rehearing which is entertained by the court below. See *Gypsy Oil Co.* v. *Escoe,* 275 U. S. 498. We submit that petitioner was in fact a party to the proceedings by reason of the service of the order upon it and, having failed to

[1] Rule 24 of the Revised Rules of the United States Circuit Court of Appeals for the Tenth District, revised November 18, 1943.

protect its rights in the manner prescribed by the order and rules of the court below, it is barred from seeking review in this Court.

Petitioner seeks to avoid the consequences of its failure to make a timely appearance in the court below and to prosecute a seasonable application for review of the court's order by now purporting to seek review of the court's subsequent order denying petitioner's motion "to re-open this cause and for leave to file petition of intervention" (R. 72). This position presupposes that petitioner was not a party to the proceeding resulting in the order of August 17, 1946; therefore petitioner has no standing to have that order reviewed. *Posner* v. *Anderson,* 293 U. S. 531. But if petitioner was a party to the proceeding, its motion amounted to a collateral attack on the order which was not considered on its merits by the court below and consequently cannot be reviewed here (cf. *Isenberg* v. *Sherman*, 286 U. S. 547).[2]

Petitioner asserts, on the basis of dictum in *Credits Commutation Co.* v. *United States,* 177 U. S. 311, that since it claims an interest in the fund, its right to intervene was absolute and denial of its application is subject to review. Whether the right to intervene be regarded as absolute or within the discretion of the court, the

[2] For a discussion of the facts in that case see Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 725–6.

court could only permit intervention by reopening a matter which had been finally adjudicated. While the court had power under Rule 60 (b) of the Federal Rules of Civil Procedure to reopen the proceedings to relieve a party of a judgment "taken against him through his mistake, inadvertence, surprise, or excusable neglect", no effort has been made in this case to show that petitioner was entitled to such relief. An application for relief under Rule 60 (b) is addressed to the sound discretion of the court and it is an abuse of that discretion to reopen a case after final judgment in the absence of an appropriate showing of the required circumstances. *Western Union Telegraph Co.* v. *Dismang,* 106 F. 2d 362, 364 (C. C. A. 10). Likewise, we think that regardless of the character of petitioner's alleged right to intervene, it was within the broad discretion of the court to deny the application as coming too late. See *White* v. *Hanson,* 126 F. 2d 559 (C. C. A. 10); *Baltimore Trust Co.* v. *Interocean Oil Co.,* 30 F. Supp. 484 (D. Md.). Since the decision on the motion was one which rested in the discretion of the court below, it is not open to review on writ of certiorari. *Credits Commutation Co.* v. *United States, supra,* and cases cited at 316–317.

Petitioner, in reliance upon *Central States Co.* v. *Muscatine,* 324 U. S. 138, implies that the order of August 17, 1946, is open to collateral attack because the court below lacked jurisdiction to make the order. Certainly the court had juris-

diction over the fund in its hands and had jurisdiction to dispose of that fund. Whether its action in disposing of the fund was correct is not now open to question in a collateral proceeding. Cf. *Isenberg* v. *Sherman*, 286 U. S. 547, and see Note 2, p. 8, *supra*.

CONCLUSION

The order of the court below was correct and does not constitute an abuse of discretion. There is no conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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